



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Falcon Industries, Inc.

**File:** B-256419

**Date:** June 3, 1994

Don A. Howard, Esq., and Fob James III, Esq., Uhrig, Munger & Howard, for the protester.  
Lester Edelman, Esq., Tracy N. Gruis, Esq., and Anthony C. Occhipinti, Esq., Department of the Army, for the agency.  
Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition; a solicitation may include restrictive provisions or conditions only to the extent necessary to satisfy the agency's minimum needs.

2. Invitation for bids which does not permit consideration of bids offering alternative technical approach fully meeting the agency's minimum needs is unduly restrictive of competition where agency's exclusion of alternate technology is based solely on cost considerations; such cost considerations should generally be left to the marketplace.

### DECISION

Falcon Industries, Inc. protests the terms of invitation for bids (IFB) No. DACA29-94-B-0038, issued by the U.S. Army Corps of Engineers, New Orleans District, for remediation of petroleum contaminated soil at the former Chennault Air Force Base, Louisiana, now known as the Chennault Industrial Airpark.<sup>1</sup> Falcon contends that the IFB is unduly

<sup>1</sup>The contamination was caused primarily by jet fuel.

restrictive because it restricts remediation of the petroleum contaminated soil to the land farming method, without permitting--solely because of anticipated cost--the use of a proven alternative method, thermal remediation.<sup>2</sup> We sustain the protest because we find that the agency improperly made a determination to exclude an acceptable alternative technical approach to meeting its minimum needs--based on its belief that this alternative method would be too costly--despite an offeror's reasonable assertion that it can and will offer a lower price if permitted to do so.

Prior to the issuance of the IFB, the Corps conducted a formal investigation of the site and published a Contamination Assessment Report (CAR), which defined the extent of soil contamination and reviewed available technologies to determine the appropriate remedial action for the site. The CAR examined several remediation approaches, including containment, physical treatment, chemical treatment, biological treatment, and disposal. Of relevance here, the CAR concluded that land farming (one of four biological remediation treatments examined) was "the alternative best suited to this [remediation] action." Concerning thermal remediation, the CAR stated only as follows:

"Low Temperature Thermal Treatment (Pyrolysis Process) applies heat to the contaminated soil to drive off water and organic materials. The off-gas then has to be treated usually by secondary incineration. This process is effective

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<sup>2</sup>Land farming is a biological treatment method which has been used in the managed treatment of oily sludges, refinery wastes, and other contamination by petroleum products. Land farming is a method by which contaminated soil is excavated and spread over a large area, in 12- to 24-inch lifts; microbes and nutrients are added, the soil is tilled, which biodegrade the contaminants. Thermal remediation employs thermal desorption units to heat petroleum contaminated soil in a primary rotary chamber at 500-900 degrees F, which releases volatile organic compounds from the soil; these volatile organic compounds are then pulled into a secondary chamber heated to a minimum of 1400 degrees F (with a minimum 1 second retention time), which serves to destroy in excess of 99.5 percent of the volatile organic compounds. Thereafter, the treated soil is tested to ensure that its hydrocarbon content has been reduced to less than 100 parts per million (p.p.m.). Some jurisdictions require hydrocarbon reduction after thermal remediation to attain a level less than 10 p.p.m.; the IFB here only requires hydrocarbon reduction to less than 100 p.p.m.

when the contaminated soil matrix will be fused at normal incineration temperatures. Due to the high capital cost of mobilizing a system on site, this process is only economical for large amounts of contaminated soil. Thus, this technology is not retained [as an option]."

The IFB's specifications were prepared based on the findings and recommendations of the CAR. Consequently, the IFB, issued on December 17, 1993, restricted remediation of the petroleum contaminated soil only to land farming.<sup>3</sup> This protest was filed prior to bid opening; subsequently, the agency received 12 bids, but the award has been withheld pending our decision.

Falcon contends that thermal remediation is an effective and established technology superior to land farming that should be permitted by the Corps as an acceptable technical approach for cleaning the contaminants under the IFB. Falcon also contends that the Corps's assumption that thermal remediation costs will necessarily exceed land farming costs is unreasonable and contradicted by actual prices recently received by various agencies for thermal remediation projects.<sup>4</sup>

In response, the agency states that it carefully "prescreened" available technologies and reasonably determined that land farming was "the alternative best suited to this [effort]," considering primarily the cost factor.<sup>5</sup> The contracting officer also states that the

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<sup>3</sup>The contracting officer agrees that the agency's final selection of land farming as the sole acceptable method of remediation was based "primarily [on] cost." She further states that "[s]ince land [farming] is known to be very cost effective when real estate is available, the cost issue became the most important selecting factor."

<sup>4</sup>Falcon points out that the low bioremediation bidder under this IFB bid approximately \$29.53 per ton. Falcon has submitted evidence of thermal remediation bidders offering prices of \$26.00 and \$25.80 per ton at other federal facilities during 1993, for less total tonnage than required by this solicitation.

<sup>5</sup>In a letter to the protester from the District Engineer, dated January 28, the Corps informed Falcon that in addition to cost, various other factors were considered in selecting land farming alone, including implementability, long-term effectiveness and permanence, human health, and contaminant reduction. However, the Corps does not argue here that

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agency was concerned about "stack" emissions of the thermal remediation process raising a serious public issue because of clean air requirements. She does not further explain this statement.

For the reasons stated below, we conclude that the agency has failed to justify excluding thermal remediation as an acceptable technical approach under the solicitation. The contracting officer explains the agency's minimum needs as follows:

"The government's minimum needs from a practical standpoint is to clean the jet fuel contaminated soil to the cleanup goals established between the state and federal government, at the lowest possible cost."

Concerning technical issues, the agency has offered nothing to show that thermal remediation would not satisfy its goal of safely and effectively cleaning the contaminated soil at the facility. In this regard, although the CAR discusses air pollution concerns with respect to on-site incineration, another remediation technique considered and rejected by the CAR, it is silent about air pollution concerns in its discussions of thermal remediation, and, in fact, states that thermal remediation is an effective process for this application. Further, the protester has presented evidence (unrebutted by the agency) that thermal remediation destroys in excess of 99 percent of volatile organic compounds (VOC) rather than emit them into the air; land farming does not.<sup>5</sup>

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<sup>5</sup>(...continued)

thermal remediation does not meet these same technical criteria. Rather, the CAR, upon which the IFB's specifications were based, did not consider thermal remediation because of cost considerations and not for any technical reasons.

<sup>6</sup>The record contains the following probable air emission rates of thermal and land farming from this project, which the agency has not challenged:

	<u>VOC Emissions</u>	<u>Benzene Emissions</u>
Land farming	4,356 lbs.	1,240 lbs.
Thermal	100 lbs.	20 lbs.

Unlike the protester, the agency has not supported its position and, as stated above, has not challenged the  
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Since the agency has not presented justification for excluding thermal remediation, we must therefore conclude that the agency considered this process as unacceptable solely because it believed that the costs of thermal remediation would be prohibitively high, the basis used by the CAR for rejecting the process.

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition. 10 U.S.C. § 2305(a)(1)(B)(i) (1988). A solicitation may include restrictive provisions or conditions only to the extent necessary to satisfy its minimum needs. 10 U.S.C. § 2305(a)(1)(B)(ii). Here, as previously discussed, the record shows that thermal remediation is a viable and acceptable contamination cleaning process and that the agency excluded the process because of anticipated cost.

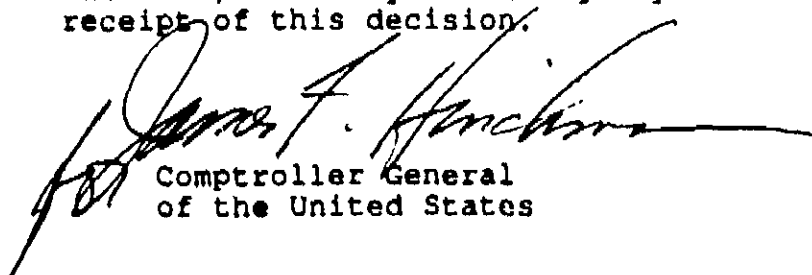
Under certain circumstances, a contracting officer may initially determine that only a particular technical approach or process is feasible for a proposed requirement because the contracting officer reasonably perceives little or no willingness in the market to supply competitive offers or bids for a more costly technical approach. Under such circumstances, a contracting officer may initially restrict the specifications to this primary technical approach. However, where, as here, a legitimate and viable offeror or bidder shows that an alternate technical approach, which potentially fully meets the agency's needs, is available at competitive prices, the contracting officer, in the interests of promoting full and open competition, and in the absence of any technical reasons to reject the alternate approach, must relax the specifications to permit the alternate offeror an opportunity to compete. This is because a solicitation may only contain restrictive provisions from a technical standpoint to the extent necessary to satisfy the agency's minimum needs; cost considerations should generally be left to the marketplace. See Peninsula Tel. and Tel. Co., 58 Comp. Gen. 324 (1979), 79-1 CPD ¶ 176; System Dev. Corp., 58 Comp. Gen. 475 (1979), 79-1 CPD ¶ 303; Olivetti Corp. of Am., B-187369, Feb. 28, 1977, 77-1 CPD ¶ 146. Accordingly, we sustain the protest.

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protester's empirical data. The protester has also presented other evidence that shows that competent thermal remediation works without failure on soils contaminated with lighter petroleum products, such as gasoline and jet fuel, and that bioremediation has at times failed in the past when used for such purposes.

We recommend that the agency cancel the solicitation, revise its specifications to permit thermal remediation as an acceptable approach under the terms of the IFB, and solicit new bids. Falcon is also entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). In accordance with 4 C.F.R. § 21.6(f), Falcon should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision.



James F. Hinchey  
Comptroller General  
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